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# Dealing with the Fragmentation of Global Climate Governance

## Legal and Political Approaches in Interplay Management

Harro van Asselt

**Global Governance Working Paper**

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The Global Governance Project is a joint research programme of eight European research institutions. It seeks to advance understanding of the new actors, institutions and mechanisms of global governance, especially in the field of sustainable development.

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## Abstract

The complexity of addressing climate change can be partly ascribed to the fact that the problem is interlinked in both cause and effect with most areas of human activity. As a consequence, global climate governance has been fragmented in nature. Therefore, determining the effectiveness of the climate regime should take into account interactions with other regimes. This paper focuses on different ways of managing interactions between formalised multilateral regimes related to climate change, thereby including the role of international law. It concludes that neither legal nor political approaches are a panacea for interplay management. However, there is potential for the one approach to address the gaps in the other. Whereas international law does not address synergies between environmental treaties, strengthened political coordination and cooperation between them could. Conversely, whereas political efforts are not sufficient to break the stalemate between the trade and climate regimes, a groundbreaking ruling by a dispute settlement body based on legal techniques could. It is worth investigating further how international law and politics can work together in reaping synergies and addressing conflicts between multilateral regimes on climate change.

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## Foreword

This working paper was written as part of the Global Governance Project, a joint research programme of eight European research institutions that seeks to advance understanding of the new actors, institutions and mechanisms of global governance. While we address the phenomenon of global governance in general, most research projects focus on global environmental change and governance for sustainable development. The Project is co-ordinated by the Institute for Environmental Studies (IVM) of the Vrije Universiteit Amsterdam and includes associate faculty members and research fellows from eight European institutions: Science Po Bordeaux, Bremen University, Freie Universität Berlin (Environmental Policy Research Centre), London School of Economics and Political Science, Oldenburg University, Potsdam Institute for Climate Impact Research, Vrije Universiteit Amsterdam, and Wageningen University.

Analytically, we define global governance by three criteria, which also shape the research groups within the Project. First, we see global governance as characterised by the increasing participation of actors other than states, ranging from private actors such as multinational corporations and (networks of) scientists and environmentalists to public non-state actors such as intergovernmental organisations ('multiactor governance'). These new actors of global governance are the focus of our research group MANUS—Managers of Global Change.

Second, we see global governance as marked by new mechanisms of organisation such as public-private and private-private partnerships, alongside the traditional system of legal treaties negotiated by states. This is the focus of our research group MECGLO—New Mechanisms of Global Governance.

Third, we see global governance as characterised by different layers and clusters of rule-making and rule-implementation, both vertically between supranational, international, national and subnational layers of authority ('multilevel governance') and horizontally between different parallel rule-making systems. This stands at the centre of our research group MOSAIC—'Multiple Options, Solutions and Approaches: Institutional Interplay and Conflict'.

Comments on this working paper, as well as on the other activities of the Global Governance Project, are highly welcome. We believe that understanding global governance is only feasible through joint effort of colleagues from various backgrounds and from all regions of the world. We look forward to your response.

Frank Biermann

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## 1 Introduction

This paper focuses on ways of dealing with the fragmentation of international regimes related to climate change, and the subsequent interactions between them. In other words, it addresses what Stokke (2001) terms ‘interplay management’, and Gehring and Oberthür (2006) call the ‘policy response’. However, whereas these authors mainly focus on the political aspects of addressing interactions, this paper uses a slightly wider angle by including the role of international law. It argues that international law by itself cannot deal with the fragmentation of global climate governance in a comprehensive fashion. Nevertheless, the paper points out that international law still offers some interesting avenues for addressing conflicts between environmental and non-environmental treaties. However, there is a need to complement these tools by political efforts aimed at enhanced coordination and cooperation between environmental regimes.

Anthropogenic climate change has a number of wide-ranging impacts on the natural environment and society, whereas various human activities and sectors of society contribute to increased concentrations of greenhouse gases in the atmosphere (IPCC, 2001). Because of the intricate connections between climate change and other issue areas, there are interrelationships between the global climate regime and other areas of international law. Notwithstanding the relevance of these other areas, the lion’s share of international law on climate change is still to be found in the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and its 1997 Kyoto Protocol, and in decisions taken by the Conference of the Parties (COP) to the UNFCCC and the Conference of the Parties serving as Meeting of the Parties (COP/MOP) to the Kyoto Protocol. The issue coverage of the different treaties in question frequently overlaps with each other—sometimes to a large extent—causing ‘treaty congestion’ (Brown-Weiss, 1993; Hicks, 1999), with potential consequences for their effectiveness. To give but a few examples: climate change is affecting and will continue to affect flora and fauna protected under various biodiversity-related treaties (IPCC 2002; SCBD 2003); substitutes for ozone depleting substances promoted under the Montreal Protocol may increase greenhouse gas emissions (Oberthür 2001); certain forms of oceanic carbon sequestration—a potential form of climate change mitigation—may be in violation with the law of the sea (Scott, 2005); bilateral or regional investment agreements may prohibit the kind of conditioning of investments that the Kyoto Protocol’s flexibility mechanisms promote (Werksman et al. 2003); etc.<sup>1</sup> In short, the very nature of climate change as an issue of sustainable development makes it almost impossible to capture all relevant aspects under a single legal regime, necessitating the consideration of interactions with other regimes (Van Asselt et al. 2005).

<sup>1</sup> In addition, recent developments have pointed to the relevance of interactions of international legal instruments *within* the issue area of climate change. For example, how do plurilateral, non-binding agreements, such as the 2005 Asia-Pacific Partnership on Clean Development and Climate relate to the UNFCCC framework (McGee and Taplin 2006)? This paper does not address this question, although some of its findings may be relevant for this type of interaction as well.



This fragmentation of global climate change governance poses a significant challenge, as different international norms may have a bearing on a particular situation.<sup>2</sup> The consequences may be in the form of conflicts between treaties, yet there is also significant potential for synergies between them. These conflicts and synergies between regimes are not always apparent from the rules agreed at the international level. Tensions below the surface could lead to divergences in the implementation of different treaties. Similarly, it is not always necessary for two treaties to state their mutual supportiveness in order for States to implement them in a synergetic fashion.

It can be said that fragmentation “reflects the high political salience of environmental issues and their particular problem structure”, and should be regarded as “a strength rather than a weakness of environmental co-operation” (Oberthür and Gehring 2004: 369). However, the multiplicity of institutional arrangements, and consequently the overlapping of regimes, could also pose a threat to the coherence of international environmental governance. In dealing with interactions, it is therefore important to aim at strengthening the overall coherence of international cooperation, by exploiting the synergies between different agreements, and minimising potential or actual conflicts.

The scope of this paper is limited to addressing horizontal interactions between the climate regime and other multilateral regimes. It does not examine ways of responding to vertical interactions between, for example, the climate regime and European Union policies (see Oberthür 2006). Furthermore, it only discusses how to deal with interactions between formalised multilateral regimes in a narrow sense, i.e. treaty-based regimes in particular issue areas. Interactions between the climate regime and international organisations are not analyzed, although—where appropriate—the role of international organisations in addressing interactions will be touched upon.

The paper is structured as follows. Section 2 explains how international law deals with fragmentation, arguing that there are limitations to its use as international law is primarily focused on conflicts. Section 3 then moves on to see what is possible beyond international law, and how to focus on synergies. Finally, Section 4 provides some concluding thoughts.

## **2 The Limits and Merits of International Law**

In dealing with relations between treaties, international law and international legal literature has shown a heavy preoccupation with conflicting instances (e.g. Jenks 1953; Pauwelyn 2003; Wolfrum and Matz 2003; Borgen 2005; ILC 2006; Vranes 2006). This emphasis on avoiding and resolving conflicts can perhaps be explained by a desire to establish legal certainty as to which norm applies in a particular situation.

The main questions for international lawyers are: 1) can a conflict be established?; and 2) if so, which treaty prevails? This section provides an overview of several traditional approaches used in international law to establish and resolve conflicts, as well as proposals for more forward-looking approaches. It also discusses to what extent these approaches could be useful in addressing climate-related interactions.

<sup>2</sup> Fragmentation refers to the implications of increased specialization and diversification in international governance arrangements, including the overlap of substantive rules and jurisdictions.

### 2.1 *Traditional Conflict Resolution Approaches*

Before arguing whether international law can take on a role in addressing conflicts, it first needs to be established whether a conflict actually exists. As noted in the introduction, a conflict between regimes is not always evident from the treaty rules. Nevertheless, Pauwelyn (2003) takes a rather strict approach to the concept of ‘conflict of norms’, dealing only with conflicts of legally binding norms—which can consist of obligations and rights—in international law. Vranes (2006) argues that Pauwelyn’s conflict definition is actually wide, and that more narrow definitions are conceivable. Such definitions would deny the existence of a conflict, for example, if the climate regime would permit its Parties to use trade-restrictive measures that would violate the General Agreement on Tariffs and Trade (GATT). However, especially in international environmental law, this narrow construction of conflicts does not cover all the divergences and inconsistencies between treaties that may have negative effects (Wolfrum and Matz 2003). Therefore, a broader concept of conflict “as a situation where two rules or principles suggest different ways of dealing with a problem” (ILC 2006: 19) seems more appropriate to cover all climate related interactions. This definition seems at least broad enough to cover conflicts between international legal instruments with diverging objectives, such as the climate and trade regimes, and could perhaps also be useful in dealing with conflicts between multilateral environmental agreements.

An additional challenge is posed by possibly inconsistent decision-making in different treaty bodies, which are increasingly involved in rule development that comes close to *de facto* lawmaking (Churchill and Ulfstein 2000; Brunnée 2002). As a result, discrepancies between two different issue areas could not only result from the treaties in question, but also from subsequent rules agreed upon by their treaty bodies. However, a definition of conflicts as described above does not cover these inconsistencies.

#### ‘CONFLICT CLAUSES’

The starting point in addressing conflicts is examining whether States have sought to regulate these through so-called ‘conflict clauses’ (Pauwelyn 2003). The purpose of these clauses is to clarify the relation between treaties, thus preventing contradictions. This can be achieved, for example, by providing that existing treaties prevail or that a new agreement prevails over existing ones (Wolfrum and Matz 2003). Not all treaties contain such clauses. The Agreement establishing the World Trade Organization (WTO), for example, does not set out how it relates to existing or future treaties, nor does the Montreal Protocol. However, various agreements under the auspices of the WTO include an environmental exception clause. The most well-known clause in this regard is Article XX (b) and (g) of the GATT, which makes an exception for trade measures “necessary to protect human, animal or plant life or health” and “relating to the conservation of exhaustible natural resources” respectively.

In contrast, the climate agreements contain several clauses that regulate their relation with other multilateral treaties. With regard to the Montreal Protocol, the UNFCCC and the Kyoto Protocol delimit their scope by only covering “greenhouse gases not controlled by the Montreal Protocol”. Thereby, the climate agreements express awareness of the substantive interlinkages between the problems of climate change and ozone layer depletion, as some ozone-depleting substances are also greenhouse gases. However, it does not in itself prevent or resolve conflicts (Oberthür, 2001).

Another clause is relevant for an issue that has garnered much attention, namely the use of carbon sinks in the Kyoto Protocol's Clean Development Mechanism (CDM). Forestry projects are to a limited extent eligible for emission reduction credits under the CDM rules. However, it is feared that these rules do not ensure the protection of biodiversity and the prevention of land degradation, and could hence conflict with objectives and obligations of other environmental treaties (Pontecorvo 1999; Jacquemont and Caparrós 2002). In particular, one of the main concerns is that the rules enable projects that result in destructive large-scale, monoculture plantations, rather than providing protection for existing old-growth forests. Plantations are cost-effective, given that they involve fast-growing trees (such as Eucalyptus) that would result in more CO<sub>2</sub> being sequestered and hence more credits being generated; however, the projects may have negative impacts on local biodiversity or landscape. The Kyoto Protocol calls on its Parties to implement policies and measures, including the protection and enhancement of sinks and reservoirs, "taking into account its commitments under relevant international environmental agreements" (Article 2.1 (a) (ii) Kyoto Protocol). Although this provision does not state *which* agreements need to be taken into account, it is reasonable to assume that given the role of forests and wetlands as sinks, the Convention on Biological Diversity (CBD), the UN Convention to Combat Desertification (UNCCD) and the Ramsar Convention on Wetlands are "relevant". Additionally, the membership of these agreements should be taken into account: it is difficult to see how an agreement can be "relevant" for a Party that has not signed or ratified it. However, it is unclear what precisely is meant with "taking into account", leaving open the question which treaty would prevail in case of a conflict (Pontecorvo 1999).

Article 2.3 of the UNFCCC—on coherence with the trade regime—can also be viewed as a 'conflict clause', as it uses language that is lifted straight from the environmental exception of the GATT, and thus at least implicitly acknowledges the relation between the climate agreements and the WTO agreements. However, it does not establish a hierarchy between the two regimes beyond this acknowledgement.

Other treaties also contain conflict clauses addressing the relation with relevant international agreements, which include the UNFCCC and Kyoto Protocol. The CBD contains a clause that aims to give priority to existing agreements. The clause seems to put a potential limit on climate change mitigation measures that threaten biodiversity: Article 22.1 CBD does not give priority to existing agreements "where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity". According to Wolfrum and Matz (2003), this condition effectively reverses the conflict clause. Besides the question of how this clause would apply when a country is not a Party to one of the treaties, the CBD clause only applies to existing treaties, and therefore only applies to the UNFCCC. Doelle (2004) argues that the non-application to the Kyoto Protocol makes this avenue for addressing the CBD/Kyoto Protocol conflict "legally minimal and practically nonexistent". The UN Convention on the Law of the Sea (UNCLOS) also includes a clause that basically claims priority over any other international agreement incompatible with it (Article 311.2 UNCLOS). Consequently, if for example certain forms of geological carbon storage would be prohibited under UNCLOS, but would be endorsed under the UNFCCC umbrella, this clause could be called upon to argue that UNCLOS prevails over the climate treaty.

There are various difficulties with the use of conflict clauses: their wording is often unclear and open to diverging interpretations (e.g. what would establish "a serious

damage or threat to biological diversity"?); they are not dynamic enough to reflect new developments (e.g. changes in scientific insights); it is not always clear when a treaty comes into existence (Vierdag 1988); and there is a chance that these clauses may never be applied "in the absence of a single, unifying dispute settlement system" (Werksman 1999). Nevertheless, from an international law perspective, they provide the primary means of addressing the relation between treaties. Therefore, it is important that whenever a new agreement or amendment is negotiated—either within the UNFCCC context or outside of it—conflict clauses are drafted in a way that fully considers the implications for other treaties, and preferably in an unambiguous manner (Wolfrum and Matz 2003; Borgen 2005). Hence, it makes sense to make a list of all international legal instruments that may have an impact on the treaty under negotiations (Wolfrum and Matz 2003). This is also the crux of Hicks' (1999) proposal for a 'stop and think approach', in which the impacts of a new treaty or a treaty amendment are carefully assessed, where appropriate, in cooperation with the relevant States, secretariats and international organisations.

#### TREATY INTERPRETATION

Treaty interpretation is an important method that can be applied by diplomats and dispute settlement bodies to harmonise two norms that seem to be in conflict. It cannot resolve 'genuine conflicts', i.e. cases in which compliance with one norm leads to breach of another (Pauwelyn 2003). The main rules on how to interpret treaties can be found in the Vienna Convention on the Law of Treaties (VCLT).

Art 31 VCLT provides basic interpretation rules, stipulating that a treaty's ordinary meaning, its context, and its object and purpose should be taken into consideration. It also gives more dynamic interpretation rules, which determine that interpretation should take into account a) any subsequent agreement between the Parties on interpretation of the treaty, b) any subsequent practice in the application of the treaty, and c) "any relevant rules of international law applicable in the relations between the parties" (Article 31.3 VCLT). The first part of this provision refers to a possible 'authentic interpretation' that Parties may adopt. WTO Members, for example, could adopt an interpretative statement concerning the scope of its environmental exception, enabling compatibility between the trade and climate agreements (Stokke 2004). Although this may clarify aspects of the relation between the agreements, it may be practically infeasible to adopt such an interpretation if there are States that are only Party to one of the treaties in question, such as the United States. This caveat also holds for "any subsequent practice" (Wolfrum and Matz 2003). Moreover, there are difficulties in determining what interpretation can be tied to the States' practice.

The third rule of Article 31.1 (c) is perhaps the most interesting one. It includes a principle of 'systemic integration' (McLachlan 2005) that opens up the possibility to interpret treaties in the light of a broader system of international law, of which other related treaties related are also a part. Given the relatively young age of international environmental law, the lack of references to environmental considerations, linkages between environmental and non-environmental issue areas, and continuous changes in scientific insights (French, 2006), it is attractive to use this interpretative tool in disputes between, for example, climate and trade. Pontecorvo (1999) views the provision as a possibility to apply a 'harmonising approach' to the conflict between the CBD and

Kyoto Protocol on the issue of sinks. The main question in this regard is whether the relevant law must be in place at the time of the adoption of a new treaty or at the time of interpretation. The latter allows for a more ‘evolutionary approach’ to treaty interpretation, and is arguably appropriate when interpreting terms that are likely to evolve over time (Pauwelyn 2003). This would mean, for example, that some provisions of UNCLOS, adopted in 1982, could now be interpreted to apply to the issue of climate change, even though negotiations on the UNFCCC did not start until the late 1980s (Doelle 2006).

However, even the more dynamic provisions on treaty interpretation of the VCLT cannot remove the general limitations of interpretation. First, interpretation is always intended to give meaning to terms of a treaty that are insufficiently clear (Wolfrum and Matz 2003). If this is the case, then for a rule from another treaty to be used in the interpretation, it must be related to the ambiguous provision. Simply put, interpretation cannot result in a rule of, for example, the CBD replacing a rule from the Kyoto Protocol. Second, and relevant especially for interactions between the trade and climate regimes, international environmental law lacks a strong dispute settlement system. As the world trading system has a particularly strong dispute settlement mechanism, most trade-environment disputes will be adjudicated in the light of trade rules, resulting in a general bias against international environmental rules (Voigt 2005).

#### CONFLICT RESOLUTION RULES

Article 30 VCLT provides rules on the resolution of conflicts. An apparent limitation of this provision is that it only applies to treaties relating to the same subject matter (Article 30.1 VCLT). Of course, application then depends on how one defines ‘subject matter’. On the one hand, if this is seen as broad as ‘protection of the environment’, Article 30 could theoretically apply to conflicts between the UNFCCC and CBD. On the other hand, Jacquemont and Caparrós (2002) argue that the issues of climate change and biodiversity cannot reasonably be seen as related to the same subject matter. However, the ILC (2006: 130) argues that whenever “the fulfilment of the obligation under one treaty affects the fulfilment of the obligation of another”, it can be said that two treaties relate to the same subject matter. This would mean that not only conflicts between the biodiversity and climate regimes, but also conflicts between the climate and trade regimes could potentially be resolved through the tools offered by the VCLT. Borgen (2005: 603) applies a more stringent interpretation of the article, and comes to the conclusion that “the [Vienna Convention] is not applicable to the thornier issues of what happens when treaties have different foci but overlapping issue areas”.

Whether or not Article 30 VCLT is applicable, the general rules on treaty conflicts, including *lex posterior* and *lex specialis*, still apply. However, the relevance of the *lex posterior* rule—the newer treaty prevails over the older one—faces severe limitations when the Parties to the two treaties are not identical (Wolfrum and Matz 2003). Furthermore, there are general legal uncertainties about when a treaty comes into existence (Vierdag 1988). This is particularly pertinent in the case of the Rio Conventions (UNFCCC, CBD and UNCCD), which were negotiated in parallel, although they were adopted and entered into force on different dates. The usefulness of the *lex specialis* maxim—the more specific treaty prevails over the more general one—is also limited, as it applies only to different treaties relating to the same subject, and although the cases

discussed here may deal with the same subject matter, they do so from a completely different angle.

## 2.2 *Limitations, But a Role Nevertheless?*

Even if the conflict rules of the law of treaties do not provide for clear-cut solutions to the problems at hand, there may be a role for general international law in addressing interactions. General international law consists of customary international law, including customary international environmental law, general principles of law, and *jus cogens*. As the precise contents of general principles of law and customary international law are not entirely clear, there is an opportunity to inject principles and rules of international environmental law in the law applicable to a certain conflict. In other words, in case of a dispute before an international judicial body, international law offers an opportunity to balance the interests of different regimes. The application of general international law is different from treaty interpretation, even though they can be used side-by-side as tools in a dispute. Addressing a conflict by applying general international law assumes a more important role of the norms outside the treaty, as they can be applied directly.

For general principles of law, Voigt (2005) argues that a principle needs to fulfil the following three criteria: it needs to be of normative value; it must represent the collective interest of the whole international community; and it needs to encompass interaction between a set of diverse factors. Notwithstanding the fact that the contents of many principles of international environmental law are not agreed upon, prime candidates that could be considered include sustainable development, intergenerational equity, common concern for humankind, and the precautionary principle (Voigt, 2005). It is beyond the scope of this paper to assess the legal status of all these principles and their suitability to be used in the case of conflicts. Nevertheless, it is submitted that their application could entail a more balanced appraisal of environmental and non-environmental considerations in case of a dispute related to trade measures taken pursuant to the climate treaties.

A related question is whether international environmental law can constitute *jus cogens*—rules from which derogation is not possible. Although international norms need to fulfil strict criteria in order to qualify, there is a possibility that some norms of international environmental law may constitute *jus cogens* in the future. This approach seems an interesting one to address conflicts between trade and climate. However, it would only be helpful to a limited extent in case of a conflict between the climate agreements and other environmental treaties, depending on the principle that is called upon. Only if one of the environmental agreements clearly contributes to practices that run counter to the meaning of the emerging principle, it would be of use. This would be the case if the Kyoto Protocol clearly contributes to unsustainable forest management. However, conflicts are almost never as straightforward as this, and it is difficult to ascertain when the rules developed under the climate regime contribute to unsustainable practices, or when they just leave enough leeway for States to do so. In other words, it is difficult to apply general international law to conflicts between environmental treaties when there is no conflict between the blackletter rules, but only in the practical execution of these rules. Furthermore, the introduction of *jus cogens* into relations between

environmental treaties implies establishing a hierarchy between them—a perception that runs counter to the idea of creating synergies.

Finally, international law allows Parties to amend treaties in order to address conflicts or to enhance synergies. The GATT could for example be amended so as to allow certain climate-friendly processes and production methods (Stokke 2004), or the Parties to the UNFCCC could adopt an optional protocol on avoiding deforestation, or even think of a protocol on climate change and biodiversity (Wolfrum and Matz 2003). Such a protocol could address the interactions between the Kyoto Protocol's flexibility mechanisms and other environmental regimes in a more comprehensive manner, meaning that the Kyoto mechanisms should not aggravate other environmental problems, by for example promoting large-scale monoculture plantations, but that they should also provide incentives for achieving the goals of other environmental treaties, for example by giving preference to CDM projects that also contribute to restoring and preserving wetlands. However, given the nature of international environmental negotiation processes, changing a treaty seems to be more a question of political will than one of international law. In addition, given the potential implications of treaty amendments, the rules for amending a treaty tend to be cumbersome. Furthermore, given the elaborate rule development in for example the climate and biodiversity regimes through their respective treaty bodies, it seems more likely that interaction questions will (continue to) be addressed by COP decisions rather than by amendment.

### 2.3 *Discussion*

A number of inferences can be made on the basis of the foregoing. First, international law seems primarily occupied with conflicts, rather than enhancing synergies. International law does not give States an obligation or an incentive to exploit synergies when the objectives or specific provisions of two treaties are overlapping. The VCLT, for example, does not deal with the procedural aspects of overlapping treaties, such as different reporting requirements (Hicks, 1999). Ultimately, international law primarily plays a role in the delimitation of issue areas, which “tends to be a matter of conflict and of the distribution of power between the institutions involved, rather than of amicable problem solving” (Gehring and Oberthür 2006: 337).

Second, the VCLT does not seem to be the proper instrument to address conflicts between treaty norms in practice. As Borgen (2005: 605) notes, “[w]hen instances of treaty conflicts are mentioned it is usually by academics or other observers. Further, when such conflicts do attract the attention of decisionmakers, they tend to be resolved in ad hoc political bargains rather than by an application of blackletter principles.” The conflict rules of the VCLT especially seem to lack the subtlety to deal with broad and complex interactions between multilateral environmental agreements, for which the establishment of a hierarchical relationship between treaties is neither possible nor desirable (Pontecorvo 1999).

Third, international law on conflicts does not address conflicts arising from decisions of treaty bodies. Both the UNFCCC and the Kyoto Protocol leave many issues up to their respective treaty bodies, and at times remain ambiguous in the specific treaty language. This could mean—as has happened for the sinks issue—that the texts of two treaties are perfectly compatible, while subsequent treaty body decisions trigger the

conflict. Since the Vienna Convention only applies to *treaties* as such, this further limits its usefulness.

Finally, international law nevertheless offers some interesting avenues to address conflicts between climate change and non-environmental regimes, such as the trade regime. In the first place, these include ways to avoid conflicts or enhance synergies from the negotiation stages onwards, through more careful and unambiguous drafting of conflict clauses before a treaty comes into existence, through amending a treaty that is already in existence, or perhaps even negotiating a new treaty. In the second place, there is room for more creative use of the dynamic rules on treaty interpretation in case of a clash between two treaties. Treaty interpretation could include the use of emerging principles of international sustainable development law and provisions of environmental agreements, and the use of these principles and rules in the law applicable to a conflict.

### **3 From Conflicts to Synergies? Beyond International Law**

The previous section has shown that international law does not particularly aim at enhancing synergies between treaties. This seems at odds with observations that cases of synergies—and not conflicts—dominate in international environmental governance (Gehring and Oberthür 2006). This calls for attention for ongoing activities and further options to enhance these synergies. Below, I first discuss the extent to which the climate and other regimes are already making efforts to enhance synergies (as well as mitigating conflicts). This is followed by a preliminary discussion of options of how such efforts can be strengthened.

#### *3.1 Ongoing Coordination and Cooperation*

Stokke (2001) points to the relevance of institutional coordination and cooperation in dealing with interactions. This could take place simply through information exchange between treaty bodies, or in a “more ambitious form of comprising joint planning of programmes or even the coordination of substantive decision-making or implementation activities” (Stokke 2001: 12).

The climate regime has become increasingly involved in this form of ‘interplay management’. In particular, it has sought to address interactions through: a) promoting coherence of rules; b) promoting coherence of national implementation; c) supporting implementation through cooperation; d) joint or coordinated scientific research and assessment; and e) information exchange (Yamin and Depledge 2004). However, these activities as such do not necessarily enhance synergies or address conflicts (Zelli forthcoming). It can even be argued that over-coordination might make matters worse. Looking at the national level, Boyer (2001: 8) argues that coordination efforts should “avoid any duplication that may overburden government administration officials and result in competing roles, coordination fatigue, and counter-productive measures”. For the UNFCCC, coordination requires additional efforts from the UNFCCC secretariat, and the question is whether this body can be expected to coordinate all interactions between the climate and other regimes. Furthermore, as is shown below, there are limits to interplay management, especially in cases of interactions across policy areas, such as trade and climate.



#### COORDINATION AND COOPERATION WITH OTHER ENVIRONMENTAL REGIMES

The potential for enhancing synergies is greatest when the objectives of treaties already overlap. This is principally the case for the different multilateral environmental agreements. Therefore not surprisingly, there are ongoing coordination and cooperation efforts between the climate regime and other environmental regimes.

The three Rio Conventions all aim to contribute to the overarching goal of sustainable development. More specifically, the UNFCCC is cognisant of the potential synergies with biodiversity protection. Its objective of stabilisation of greenhouse gases at non-dangerous levels is to be achieved “within a time-frame sufficient to allow ecosystems to adapt naturally to climate change” (Article 2). Furthermore, Parties to the UNFCCC are committed to “promote and cooperate in the conservation and enhancement [...] of sinks and reservoirs [...], including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems” (Article 4.1 (d)). The need to protect areas prone to desertification and droughts is also explicitly acknowledged by the UNFCCC (Article 4.1 (e)), whereas the protection of wetlands may be implied from its provisions. The goals of the CBD and UNCCD can be said to be in line with the UNFCCC objective.

The Rio Conventions all encourage cooperation with other relevant treaty bodies and international organisations.<sup>3</sup> The Ramsar Convention on wetlands itself does not call for cooperation, as it was adopted long before the Rio Conventions. However, its aim, which is to ensure the conservation and wise use of wetlands (Article 3.1), has over the years been defined in the context of sustainable development.

The provisions of the climate and ozone treaties are in principle synergetic, as the Montreal Protocol intends to phase out certain ozone-depleting substances that are also greenhouse gases. In practice, however, the functional relation between the two agreements has also been conflictual, as one of the substitutes for ozone-depleting substances promoted by the Montreal Protocol, HFCs, is a potent greenhouse gas (Oberthür 2001). The UNFCCC secretariat is mandated to coordinate with other secretariats, including the ozone secretariat (Article 8.2 (e) UNFCCC; Article 14.2 Kyoto Protocol). Similarly, the ozone secretariat is charged with coordination (Article 7.1 (e) Vienna Convention). However, inter-institutional coordination has mainly been limited to the mutual attending of meetings, scientific cooperation and information exchange, as it proves to be difficult to link abatement action in the area of climate change to ozone depletion for political reasons. Yamin and Depledge (2004) note that the US, given its non-ratification of the Kyoto Protocol and its early conversion from CFCs to HFCs is reluctant to address the issues together. Furthermore, there is resistance from developing countries that already use HFCs.

In the UNFCCC, institutional cooperation with other multilateral environmental agreements has mainly been dealt with in response to activities initiated under other treaties. Although cooperation has been an item on the agenda of the Subsidiary Body for Scientific and Technological Advice (SBSTA) for some time, interactions between the Rio Conventions were only taken up in 1999 (UNFCCC 1999). In 2002, the COP called for enhanced cooperation “with the aim of ensuring the environmental integrity

<sup>3</sup> Articles 7.2 (l) and 8.2 (e) of the UNFCCC; Articles 8.1, 22.2 (i), and 23.2 (d) of the UNCCD; Articles 5, 23.4 (h), and 24.1 (d) of the CBD. See also Article 13.4 (i) and 14.2 of the Kyoto Protocol.

of the conventions and promoting synergies under the common objective of sustainable development, in order to avoid duplication of efforts, strengthen joint efforts and use available resources more efficiently” (UNFCCC 2003a).

The COP of the CBD has been particularly active in addressing interactions with the climate regime, and has repeatedly urged the CBD secretariat to develop closer ties with the UNFCCC. For example, with regard to forest biological diversity, the CBD has requested the UNFCCC “to ensure that future activities of the UNFCCC, including forest and carbon sequestration, are consistent with and supportive of the conservation and sustainable use of biological diversity” (CBD, 2000a). The main purpose of these decisions seems to be to avoid conflicts on forestry and biodiversity questions, and they have been instrumental in highlighting biodiversity concerns in UNFCCC COP decisions (Yamin and Depledge 2004). There are also a number of decisions that are aimed at promoting synergies. For example, the CBD has highlighted the risks of climate change for certain vulnerable ecosystems such as coral reefs and mountain ecosystems. On forests, the CBD has identified the potential of ‘incentive measures’ under the UNFCCC or the Kyoto Protocol that could help achieving CBD goals (CBD 2000b; 2002). In 2004, the CBD adopted a decision on biodiversity and climate change, in which it noted that there are opportunities to implement climate change mitigation and adaptation activities in ways that contribute to fulfilling the objectives of several environmental treaties at the same time (CBD 2004).

The UNCCD has also actively sought cooperation with the other Rio Conventions. The activities it has promoted and discussed primarily concern enhancing synergies, such as the parallel development of climate change adaptation plans and action programmes to combat desertification, or the use of the CDM as an incentive (UNCCD 1999; 2005).

In 2001, a Joint Liaison Group (JLG) was formed between the secretariats of the three Rio Conventions, at the initiative of the CBD. The UNFCCC asked the JLG to enhance coordination between the three conventions, and to explore options for further cooperation (UNFCCC, 2001). The group has met five times, focusing on crosscutting issues such as research and monitoring, information exchange, technology transfer, capacity building, financial resources, education and public awareness, and adaptation. In 2004, the JLG prepared a report on enhanced cooperation between the Rio Conventions (UNFCCC 2004). Among the options for enhanced cooperation identified were further collaboration among national focal points; further collaboration between secretariats and convention bodies, including more systematic cross-participation, joint thematic workshops, and coordinated requests for scientific advice from external bodies; and cooperation in specific crosscutting areas. In addition to the JLG, the secretariats of the conventions attend each other’s meetings, and have organised joint workshops to address synergies between the treaties.

The Ramsar Convention has increasingly sought cooperation with the UNFCCC. Specifically, the Ramsar Bureau has shown to be willing to cooperate with the secretariats of other international environmental agreements. It has concluded a set of Memoranda of Understanding and Memoranda of Cooperation with different secretariats and international organisations, including the CBD and UNCCD secretariats—but not with the UNFCCC secretariat. Still, the Ramsar Bureau has yet to become a full member of the JLG. In 2002, the Ramsar COP adopted a resolution on climate change and wetlands, in which it called, among others, for wetland management that increases

their resilience to climate change, and for action to minimise the degradation, and promote restoration of wetlands with significant carbon storage or sequestration ability. Importantly, Parties to the UNFCCC and the Kyoto Protocol are urged to ensure that climate change mitigation activities do not “lead to serious damage to the ecological character of their wetlands” (Ramsar 2002).

#### COORDINATION AND COOPERATION WITH NON-ENVIRONMENTAL REGIMES

Attention on coordination with non-environmental regimes has mainly focused on responding to interactions with the multilateral trading system. One notable exception is the coordination sought by the climate regime with the International Maritime Organisation, which has adopted a number of treaties on marine pollution. Article 2.2 of the Kyoto Protocol calls on Parties to address emissions from vessels by working through the IMO (bunker fuels). However, this has thus far not resulted in any real action to reduce emissions (Oberthür 2003; 2006).

Given the many (potential) interactions between climate and trade (Brack et al. 2000; Chambers 2001; Charnovitz 2003), it is perhaps surprising that the institutional relation with the WTO has received little attention in the UNFCCC. Only in 2003, the UNFCCC secretariat summarised the state of the negotiations in the WTO relevant for the climate regime (UNFCCC 2003b). In comparison, in the WTO, the relation with a range of multilateral environmental agreements—not the climate treaties in particular—has been discussed extensively. Most of these discussions have taken place in the WTO’s Committee on Trade and Environment (CTE). Although the CTE was mandated to address trade related environmental measures pursuant to multilateral environmental agreements, there has been no substantive outcome of the discussions in the CTE (Yamin and Depledge 2004). The UNFCCC secretariat has observer status in the CTE, although not in the CTE’s Special Sessions,<sup>4</sup> and has only been invited to these on an ad hoc basis. In May 2006, the Special Sessions decided to move away from discussing an ‘environmental window’ for the UNFCCC and other environmental treaties, thereby lowering hopes that the trade and climate will be satisfactorily addressed in the WTO.

It is the question whether it is at all desirable to address the interactions between the climate and trade regimes in the WTO as opposed to the UNFCCC, as it is unsure whether the WTO will work to promote the goals of climate protection set forth in the UNFCCC or whether it will undermine them (Linnér 2006: 285).

#### 3.2 *Options for Enhanced Coordination and Cooperation*

In spite of the various initiatives that have been undertaken by different treaty bodies, interactions between the climate and other regimes are not yet addressed in a comprehensive manner. This is in line with the more general observation of Gehring and Oberthür (2006: 324) that “significant benefits from enhancing synergy have been neglected so far and remain to be reaped”. In the literature on international environmental governance, many proposals have been tabled on how to achieve this, some of which are discussed below. A common thread in these proposals is to move beyond ‘ad

<sup>4</sup> The Special Sessions of the CTE (CTESS) form the discussion forum for most environmental aspects of the Doha Round of trade negotiations, which was launched at the end of 2001.

hoc-ism' in addressing interactions, and to address conflicts and enhance synergies in a more structural fashion that does justice to the complex interconnections between different issue areas.

#### ENHANCED COORDINATION AND COOPERATION WITH OTHER ENVIRONMENTAL REGIMES

A first step towards reducing conflicts and enhancing synergies is enhancing coordination and cooperation between environmental regimes in a manner that goes beyond the initiatives already taken by actors in the various regimes (i.e. information exchange, joint assessments, etc). It is not suggested here that these more far-reaching proposals should replace existing initiatives completely. In fact, there is still much to learn from existing initiatives (for examples, see UNFCCC 2004). For example, one of the tools used to address interactions between different environmental regimes, the Memorandum of Understanding, can be used to ensure that the Montreal Protocol does not promote the use of greenhouse gas emitting substitutes for ozone-depleting substances (Oberthür 2001).

The United Nations Environment Programme (UNEP) has already undertaken activities to enhance coordination between environmental secretariats and treaties (Wolfrum and Matz 2003). Building on these initiatives, a number of options is available, including: providing a common housing to secretariats and increasing the frequency of secretariat meetings (Hicks 1999); holding simultaneous COPs or holding them at a permanent location (Von Moltke 2005); harmonised reporting requirements or timing of reporting; and the streamlining of guidance to financial mechanism. The latter is particularly of relevance in the case of the Montreal Protocol/Kyoto Protocol interactions, as the conflict stems from two different financial mechanisms (the Montreal Protocol's Multilateral Fund and the Global Environment Facility) that provide diverging financial incentives (Oberthür 2001). All these proposals face legal and practical barriers. A legal barrier may be that the treaty in question does not provide for the desired change in institutional infrastructure or procedure (Oberthür 2002). A practical barrier may for example be the impossibility to organise joint COPs, or the lack of financial or human resources.

Another proposal is to cluster environmental treaties (Oberthür 2002). Von Moltke (2005: 177-178) describes clustering as "[i]nstitutional and organisational arrangements short of a merger that will increase the efficiency and effectiveness of existing agreements without requiring elaborate changes in legal or administrative arrangements". Clustering can encompass the forms of enhanced coordination and cooperation mentioned above. Specifically, it could entail the grouping of multilateral environmental agreements by issue area (e.g. an atmosphere or biodiversity cluster), by region (e.g. a Europe or South-East Asia cluster), by function (e.g. review of implementation or reporting), by human activity (e.g. transport or industrial production), or by environmental policy instrument (e.g. trade restrictions) (Oberthür 2002; Biermann 2005). However, creating an 'atmosphere cluster', including the climate and ozone related treaties, will undoubtedly raise opposition from developing countries, who may argue that this would downplay the development aspects of these treaties. More generally, an atmosphere cluster may downplay other interactions in which the climate regime is involved, such as those with biodiversity treaties or with the law of the sea. Moreover, given the many ways in which one can cluster environmental treaties, the

need for enhanced coordination could be even greater under a cluster system (Biermann 2005). Finally, clustering in itself does not resolve problems of interplay *per se*, but merely addresses them on a higher level.

A proposal that goes further than merely clustering agreements is to create a World Environment Organization (WEO; see Biermann and Bauer 2005, and references therein). A WEO could improve coordination between multilateral environmental agreements, facilitate their implementation at the national level, and provide incentives for financial and technology transfer to developing countries (Biermann 2005). Furthermore, a WEO could form a counterweight to the WTO (Charnovitz 2005). However, starting a process to create a WEO could lead to resistance from existing environmental regimes, including the climate regime, and there may be a general unwillingness from the Parties responsible for financial support to lose control over the funding mechanisms (Von Moltke 2005). How a possible World Environment Organization could deal with interactions involving the climate regime in practice is an interesting research question, but is beyond the scope of this paper.

#### ENHANCED COORDINATION AND COOPERATION WITH NON-ENVIRONMENTAL REGIMES

There have also been proposals to enhance institutional coordination and cooperation between the WTO and the UNFCCC. However, it should be noted upfront that any such proposal faces significant barriers for a number of reasons (Van Asselt et al. 2005). The first is the conflict of ideology and interests between the two regimes: trade liberalisation and cheap production processes (WTO) *versus* environmental protection and sustainable production processes (UNFCCC/Kyoto Protocol).<sup>5</sup> Second, the WTO has a strong institutional framework, which has been able to develop and strengthen over time, as its origins date to as far back as the end of the Second World War. A third point that complicates addressing trade and climate interactions through enhanced coordination and cooperation is the differences in some critical parties to both agreements—notably that the United States and Australia are members of the WTO, but have not ratified the Kyoto Protocol. Finally, the individuals that are engaged in the negotiations of the two different issues are usually not the same, with the WTO discussions and negotiations usually being attended by representatives of trade ministries, and UNFCCC negotiations by representatives from the environment ministries. Nevertheless, a first option would be for the UNFCCC secretariat and the CTE to conclude a non-legally binding Memorandum of Understanding, which could address outstanding contentious issues, such as the legality under the WTO of trade measures taken by parties to the Kyoto Protocol to achieve their targets. Parties to the WTO and the UNFCCC could also establish a consultative mechanism (Stokke 2004) to discuss the competitiveness effects of climate policies or establish a joint WTO/UNFCCC working group

<sup>5</sup> Admittedly, this conflict between the WTO, which has strengthened its sustainable development component over time through rulings of its dispute settlement mechanism, and the climate agreements, which explicitly indicate their compatibility with the multilateral trading system, has been mitigated to some extent. Yet fundamental differences remain, as Charnovitz (2003: 143) argues: “The climate regime is driven by the need to correct market failure. Therefore, governments want maximum flexibility at the national level in using economic instruments to influence individual behavior. By contrast, the trade regime is not a response to market failure; it is a response to government failure, that is, the distortions of policy fomented by mercantilism and protectionism.”

(Assunção and Zhang 2002). Also, a standstill agreement between the parties of the UNFCCC and the members of the WTO on climate-friendly subsidies could be concluded (Buck and Verheyen 2001). Politically—not legally—decisions of the WTO require consensus of its members, including the United States. It is hence unlikely that WTO members would pursue this path if the interests of the United States not sufficiently safeguarded (Van Asselt and Biermann 2007).

### 3.3 Discussion

There are several ways of distinguishing the different types of coordination and cooperation activities that are either ongoing or proposed:

1) *Ad hoc and structural*:<sup>6</sup> At times, coordination and cooperation consists of a one-time political effort in response to current affairs or a COP decision of another treaty. An example is the organisation of joint meetings on biodiversity and climate change interactions. Other forms of coordination and cooperation, such as the JLG, are more structural. The most extreme case in this regard would be the creation of a World Environment Organization that addresses interactions between environmental regimes.

2) *Legal basis*: Occasionally, the purpose of coordination and cooperation efforts is spelled out in some detail in a treaty (e.g. the Kyoto Protocol's mandate to cooperate with the International Maritime Organisation to address bunker fuels). Other provisions, however, are more open-ended as to the outcomes (e.g. the general provisions on cooperation with relevant international bodies in the climate agreements).

3) *Involvement of treaty bodies*: Coordination and cooperation may involve different treaty bodies, including decision-making bodies such as the COPs, and administrative bodies such as the secretariats. Because of the intergovernmental nature of decision-making bodies, activities from these bodies arguably have a higher impact on the interaction.<sup>7</sup>

One could hypothesise that coordination and cooperation efforts that are structural, have a clear legal mandate, and involve decision-making treaty bodies are more effective in addressing interactions. However, this need not be the case. Arguably, some structure needs to be built in coordination and cooperation activities, in order to ensure continuity. However, the creation of a permanent body that would merely discuss interactions, rather than conceiving of ways of managing them, is in itself insufficient. The existence of a clear legal mandate is also not always enough to address interactions, as is clear in the case of bunker fuels (Oberthür 2006). Finally, with respect to the treaty bodies involved, it can be seen that the activities that have involved secretariats often result in more practical and specific recommendations to address interactions, as compared to the decisions produced by intergovernmental bodies.

Although the various activities already taking place, as well as the proposals for reform address to a great extent the need to enhance synergies between treaties, there is one important barrier: if there is limited or no political will to cooperate or to coordi-

<sup>6</sup> This distinction largely overlaps with Zelli's (forthcoming) distinction between *ex ante* (singular) and *ex post* (sustainable) approaches.

<sup>7</sup> Another classification of coordination and cooperation efforts could be along the line of the type of interaction. Zelli (forthcoming) provides such a classification for conflicting interactions.

nate, it will be difficult, if not impossible, to realise the initiatives. This can be seen in particular in addressing the climate and trade interactions, where on the one hand the CTE has not come up with a substantive outcome with regard to the WTO's relation to the climate regime and where the UNFCCC secretariat does not even have observer status in the CTE's Special Sessions, and on the other hand the actors in the climate regime have been avoiding the issue.

Concerns over loss of national sovereignty may induce States to resist inter-institutional cooperation (Wolfrum and Matz 2003). More specifically, if the interests of States are not served by jointly or cooperatively addressing a case of interactions, they will try to stall progress in cooperation or coordination. This is reflected by Yamin and Depledge (2004: 527), who note that SBSTA "has been at pains to underscore the advisory nature of the [JLG], safeguarding the authority of Parties [...] to take decisions on inter-convention cooperation". This is in line with the more general finding that the UNFCCC secretariat has been "living in a straitjacket" (Busch 2006).

The above shows that attempts to improve institutional coordination and cooperation are also limited in their own way. It is in this regard that the legal and political approaches may complement each other. International law seems insufficient to address conflicts and synergies between multilateral environmental agreements. It does, however, provide methods to solve treaty conflicts with non-environmental treaties. In fact, it can be stated that in these cases international law perhaps provides the *only* resort to resolve conflicts (Voigt 2004).

Finally it should be added that, in practice, responsibility for the implementation of international environmental agreements often falls to a specific national institution and a national focal point (Velasquez and Pietsch 2003). As these are not always the same for the different conventions, there is a need for coordination and collaboration at the national level. There is nevertheless still a role for inter-institutional cooperation between treaty bodies, as these bodies can help with enhancing domestic implementation synergies through implementation support, awareness raising and capacity building. Nevertheless, any initiative aimed at greater coordination and cooperation at the international level should be accompanied by greater efforts to ensure coherence at the national level.

## 4 Concluding Thoughts

The fragmentation of international law, as evidenced by the proliferation of a multitude of international agreements, poses an enormous challenge as different international norms may have a bearing on a particular situation. This is particularly the case for climate change, given that both the causes and impacts of climate change have implications for many sectors of society and the environment. The interactions that occur between the climate regime and other treaty-based regimes can be conflicting, synergetic, or neutral. In order to enhance the effectiveness of the regimes involved, it is vital that conflicts are avoided or reduced and synergies are enhanced to the greatest extent possible.

This paper sought to show how international law and political efforts could complement each other in doing so. Both approaches—legal techniques and inter-institutional coordination and cooperation—certainly have their limits. For international law these are the following. First, the restrictive definition of conflict often used

by legal scholars does not cover all the divergences and inconsistencies between treaties with negative effects, such as those between environmental agreements. Second, not only treaties can create conflicts, but also decisions made by the treaty bodies (i.e. COPs) can result in conflicts. However, the international law of conflicts does not address these directly. Third, although different norms may apply in a particular situation, they do not necessarily point in diverging directions. There still is sufficient potential to exploit synergies between the climate and other agreements. However, international law remains focused on conflict avoidance and resolution, and leaves the enhancement of synergies to politics. Efforts to enhance inter-institutional coordination and cooperation are also limited in that Parties to one of the interacting regimes may simply not be willing to respond to the interactions over concerns of sovereignty. Furthermore, some coordination and cooperation efforts are too ad hoc to structurally address the interactions involved. Finally, they also do not seem to be particularly successful in interactions between 'stronger' and 'weaker' regimes (i.e. WTO and UNFCCC).

In conclusion, neither legal nor political approaches are a panacea for interplay management. However, there is potential for the one approach to address the lacunae in the other. Where international law does not address synergies between environmental treaties, strengthened political cooperation between them could. Where political efforts are not sufficient to break the stalemate between the trade and climate regimes, a groundbreaking ruling by a dispute settlement body based on legal techniques could. Although this complementary relationship may not be as straightforward in practice, this paper showed that it is worth investigating how international law and politics can work together in reaping synergies and addressing conflicts between multi-lateral regimes on climate change.



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